SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 992

NEW YORK FEED COMPANY, INC., et ano.,
*Appellants,*

*against*

HOWARD R. LEARY, et ano.,
*Appellees.*

No. 998

MILKY WAY PRODUCTIONS, INC., et al.,
*Appellants,*

*against*

HOWARD R. LEARY, et ano.,
*Appellees.*

## MOTION TO DISMISS OR AFFIRM BY LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK, IN HIS STATUTORY CAPACITY (28 U.S.C. § 2284)

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## MOTION TO DISMISS OR AFFIRM BY LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK, IN HIS STATUTORY CAPACITY (28 U.S.C. § 2284)

In these consolidated cases, considered together by the Court below (a),* Louis J. Lefkowitz, Attorney General of New York, moves pursuant to Rule 16 of the Revised Rules of this Court, that the judgment of the United States District Court for the Southern District of New York be affirmed, or, in the alternative, that this appeal be dismissed.

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* Numbers in parentheses followed by the letter "a" refer to pages in the Jurisdictional Statement of appellants *Milky Way Productions, Inc.*, et al., unless otherwise indicated.

## Opinions Below

The endorsement memorandum of the Hon. Marvin E. Frankel, District Judge, granting plaintiffs' motion to convene a three-judge District Court, is not reported. The opinion of the three-judge District Court for the Southern District of New York is reported at 305 F. Supp. 288. The opinion of the District Court is set forth in the jurisdictional statements of the appellants (1a-23a).

## Jurisdiction

Appellants invoke the jurisdiction of this Court under 28 U.S.C. Section 1253.

## Statutes Involved

New York Penal Law Sections 235.00, 235.05, and 235.10; and New York Code of Criminal Procedure Sections 148-150 (24a-27a; *New York Feed* Juris, Stat. p. 3).

## Questions Presented

1. Is an obscenity statute which sets forth practically verbatim the elements of obscenity prescribed by this Court in *Roth* v. *United States** and *Memoirs* v. *Massachusetts*** nevertheless void on its face for failure to set forth the additional factors of (a) pandering, or (b) foisting upon an unwilling public?

2. Are arrests in obscenity cases constitutionally forbidden unless the prospective defendant is afforded an

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* 354 U. S. 476 (1957).

** 383 U. S. 413 (1966).

*adversary* hearing on the question of obscenity prior to arrest?

3. Is the presumption of knowledge of the character and content of publications set forth in New York Penal Law Section 235.10 unconstitutional?

## Statement of the Case

Appellants in both cases are the publishers of periodicals which deal extensively with sexual matters.*** Local authorities in New York County made a combined total of 18 arrests of publishers and newsstand dealers in connection with specific issues of both publications (7a). No arrests were made regarding any single issue until at least one arrest warrant had been issued by a Criminal Court Judge upon *ex parte* judicial scrutiny of that particular issue (18a). No seizures of any kind occurred. As the Court below found, the arrests were made, and prosecutions undertaken, in good faith (9a). ****

Upon these facts, appellants commenced separate actions (consolidated by the Court below) for injunctive and declaratory relief, claiming: that the arrests amounted to a "prior restraint" upon circulation of their publications, since New York's arrest warrant statutes (Code of Criminal Procedure Sections 148-150) failed to require an adversary hearing prior to arrest; that New York's obscenity statute (Penal Law Section 235.00) was "overbroad" for failure to set forth the factors of pandering or foisting upon an unwilling public as additional elements in the test

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*** *Milky Way* publishes "Screw, The Sex Review"; *New York Feed* publishes "The New York Review of Sex and Politics" (3a, 10a).

**** The complaints were not dismissed, however, thus permitting appellants to offer proof of bad faith, threats or harassment at a later stage of the actions (22a-23a).

of obscenity; and (in the case of *New York Feed* only) that the "presumption of knowledge" in New York Penal Law Section 235.10 was irrational, and negated the element of scienter, and was thus unconstitutional.

The three-judge District Court below denied injunctive relief, holding New York's arrest warrant and obscenity statutes constitutional, and declined to reach the question of the "presumption of knowledge" (in Penal Law Section § 235.10) absent an adequate submission of facts, and interpretation of the statute by the New York courts (1a-23a).

## No Substantial Federal Question Is Presented Requiring Full Hearing Before This Court

**I. New York's obscenity statute, which repeats almost verbatim the elements of this Court's definition of obscenity in *Roth* and *Memoirs*, is not unconstitutional for failure to set forth the additional factors of (a) pandering or (b) foisting upon an unwilling public.**

In *Roth* v. *United States*, 354 U. S. 476 (1957) and *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), this Court established a definition of obscenity which was reiterated in *Redrup* v. *New York*, 386 U. S. 767, 770-771 (1967):

> "* * * (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value * * *."

New York's Penal Law Section 235.00 (which defines obscenity) consciously incorporates this Court's definition established in *Roth* and *Memoirs*. (See notes following McKinney's Consolidated Laws, Penal Law § 235.00).

Nevertheless, appellants claim that this Court's holding in *Redrup* required the addition of the factors of (a) pandering or (b) foisting upon an unwilling public as necessary elements of the definition of obscenity in order to sustain the constitutional validity of the statute.* The claim is based upon this Court's comment in *Redrup* that none of these additional factors was present. 386 U. S., at page 769. However, appellants overlook this Court's explicit holding in *Redrup* that (386 U. S., at p. 771):

> "Whichever of these constitutional views [including the *Roth* and *Memoirs* test] is brought to bear upon the case before us, it is clear that the judgments cannot stand." (Matter in brackets added.)

Thus, in the absence of any expression by this Court to the contrary, *Redrup* holds that the particular material there involved was not obscene as measured against the standard of the *Roth* and *Memoirs* test. No repudiation or change of the test can be discerned, even from the numerous summary reversals of obscenity convictions which followed in the wake of *Redrup*. See, e.g., 37 U.S.L.W. 3433-36; and, most recently, *Carlos* v. *New York* 38 U.S.L.W. 3205 (Dec. 8, 1969). The *Roth* and *Memoirs* test was cited with approval in *Stanley* v. *Georgia*, 394 U. S. 557, 568 (1969), which held that mere private possession of pornography (absent an intent or attempt to sell) could not be proscribed by State action.* Several courts have agreed with appellants' reading of *Redrup*, e.g., *United States* v. *4,400 Copies of Magazines*, 276 F. Supp. 902 (D. Md. 1967, *en banc*); *Grant* v. *United States*, 380 F. 2d

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* The question of sale or distribution to minors is not relevant here, since New York treats that problem separately in Penal Law § 235.20(6), held constitutional in *Ginsberg* v. *New York*, 390 U. S. 629 (1968).

* New York's Penal Law Article 235 contains no such regulation or proscription. Only the "promotion" of obscenity (i.e., sale or possession with intent to sell) is dealt with. Penal Law § 235.05.

748 (9th Cir. 1967); *Poulos* v. *Rucker*, 288 F. Supp. 305 (M. D. Ala. 1968), while others have disagreed, e.g., *United States* v. *77 Cartons of Magazines*, 300 F. Supp. 851 (N. D. Cal. 1969).

The logical implications of the additional factors urged by appellants (pandering and foisting) would tend to broaden the scope of permissible State action, rather than to limit it. For example, evidence of "pandering is relevant to the *application* of the *Roth* test", *Ginzburg* v. *United States*, 383 U. S. 463, 471 (emphasis added), and can serve to negate any minimal redeeming social value which might otherwise save a publication. *Memoirs* v. *Massachusetts*, *supra*, 383 U. S., at page 420. Similarly, "foisting upon an unwilling public" introduces the concept of nuisance, but otherwise constitutionally protected speech may be proscribed as a nuisance if uttered, for example, through an amplifier in a residential neighborhood late at night.

If the States have any constitutionally permissible interest in regulating obscenity, neither pandering nor foisting should logically be considered as decisive factors—i.e., additional necessary elements in the test of obscenity—since both go primarily to the ancillary conduct of the vendor, and not necessarily to the substance (or degree of obscenity) of the material itself. "Hard core" pornography is no less "hard core" if it is not pandered. Evidence of pandering tends to negate "redeeming social value" in close cases, but if the absence of pandering is held to confer immunity, then any material—no matter how "hard core"—may be sold, provided its advertising is sufficiently circumspect, or its cover plainly wrapped in brown. Conversely, one who sells Louisa May Alcott's "Little Women" might be required to re-examine his promotional enthusiasm. The practical result would not be simply to add an element to the three prescribed in Roth; it would be to scrap the *Roth* test entirely, and substitute

a one-element test—pandering. In strict logic, if the ancillary conduct of the vendor is to be entirely controlling, as appellants urge, then it should be considered only in the context of nuisance, i.e., "foisting upon an *unwilling* public". If there be no such nuisance, it is hard to see how pandering *per se* which is willingly received can be any more "hard core" (or any more proscribable) than the material itself. The same practical result would be reached if "foisting" were to be considered decisive, for material may be sufficiently offensive to warrant state action even though it may not be considered obscene under the *Roth* test.

The additional factors urged by appellants, while probably controlling in close cases (pandering) or valid in dealing with separate areas for regulation (foisting), do not constitute additional necessary elements in the constitutional test of obscenity, and a statute such as New York's Penal Law § 235.00 is not subject to challenge for failure to include them.

**II. A prior adversary hearing is not a necessary constitutional prerequisite to arrests in obscenity cases.**

In the context of an attack on New York's arrest warrant statutes (Code of Criminal Procedure §§ 148-150) appellants urge that arrests may not be made in obscenity cases without a prior adversary hearing, at which the prospective defendant may dispute the issue of obscenity. Otherwise, they say, an arrest constitutes a "prior restraint", or at least creates a "chilling effect" on First Amendment rights. No case decided by this Court supports any such proposition.

Appellants build upon *Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964); *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961); and *Bethview Amusement Corp.* v. *Cahn*, 416 F. 2d 410 (2d Cir. 1969), all of which involved seizures which were held to be broad, or broadly effective. But no

seizures of any kind were made in this case. Nor does this record reveal a pattern of "mass arrests", amounting to suppression, appellants' assertions to the contrary notwithstanding (9a, 18a). No arrests were made for any specific material without prior judicial scrutiny of the material involved, and the issuance of a warrant (18a). As the Court below held, the arrests in this case were made in good faith, and in a careful and discriminating manner, thus rendering *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965) inapposite (9a-10a). At issue here, then, is the abstract question of whether any arrests at all were constitutionally permissible without a prior adversary hearing. Questions concerning the *bona fides* of the arrests, or alleged calculated patterns of suppression, are not in this record (22a-23a).

A recent line of cases, e.g., *Delta Book Distributors, Inc.* v. *Cronvich*, 304 F. Supp. 662 (E. D. La. 1969); *Cambist Films, Inc.* v. *State of Illinois*, 292 F. Supp. 185 (N. D. Ill. 1968); *Sokolic* v. *Ryan*, 304 F. Supp. 213 (S. D. Ga. 1969), have held that adversary hearings prior to arrest are required, but all of these cases involved seizures. Another line of cases is in accord with the Court below, e.g., *Tyrone, Inc.* v. *Wilkinson*, 410 F. 2d 639 (4th Cir. 1969), cert. den. sub nom, *Wilkinson* v. *Tyrone, Inc.* (12/15/69, Nos. 409 and 418);* *Rage Books, Inc.* v. *Leary*, 301 F. Supp. 546. (S.D.N.Y. 1969); *Astro Cinema Corp., Inc.* v. *Mackell*, 69 Civ. 778 (E.D.N.Y. 8/19/69); *Overstock Books, Inc.* v. *Aspland*, 69 Civ. 516 (E.D.N.Y. 10/31/69); *The East Village Other, Inc.* v. *Koota*, 68 Civ. 125

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* The lower courts had granted relief concerning the seizure, but had declined to enjoin prosecutions. Local authorities petitioned for certiorari to review the rulings concerning the seizure (No. 409), and *Tyrone* petitioned for certiorari to review the denial of injunctive relief against the prosecutions (No. 418). Both applications were denied by this Court on December 15, 1969. 38 U.S.L.W. 3218.

(E.D.N.Y. 2/13/68). Indeed, convictions for obscenity in which the normal arrest procedures were utilized were upheld in *Ginsberg* v. *New York, supra,* 390 U. S. 629 (1968); *Mishkin* v. *New York,* 383 U. S. 502 (1966); and *Ginzburg* v. *United States, supra,* 383 U. S. 463 (1966). In none of these cases in this Court, however, was the point expressly passed upon.

If obscenity may constitutionally be regulated by the States at all, action must necessarily be taken at some point which will apprise the prospective defendant that the publication involved has become the subject of an accusation of obscenity. Any such action, no matter how tentative or preliminary, will tend to have at least the potentiality of some inhibitory effect. As this Court said in *Smith* v. *California,* 361 U. S. 147, at pp. 154-155:

> "Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene * * *."

This is true no matter what form the initial action may take . . . whether it be the denial of an application for an import license, or notice of the commencement of an injunction action (cf. N. Y. Code of Criminal Procedure § 22-a), or the commencement of criminal proceedings (as in this case), or a notice to appear for an adversary hearing prior to the commencement of criminal proceedings (as *Milky Way* suggests, Juris. Stmt. pp. 27-30). Indeed, the State need not act at all; a "chilling effect" may possibly result from the mere existence of a statute. See *Zwickler* v. *Koota,* 389 U. S. 241, 252, 254 (1967), but that merely leads to scrutiny of the statute on its constitutional merits.

The question posed by appellants, as to whether the State acts unconstitutionally in obscenity cases when its first step is the traditional one, the arrest, plainly leads to a negative answer. The arrest is no more inhibitory

of First Amendment rights than any other form of State action which has as its ultimate objective the regulation of obscenity.* Indeed, since the defendant is surrounded at that point with many constitutional safeguards otherwise unavailable, the arrest may be preferable to other forms of procedure. See *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 69-70 (1963); *Freedman* v. *Maryland*, 380 U. S. 51, 58-59 (1965); *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 441-43 (1957); *Near* v. *Minnesota*, 283 U. S. 697, 713-15 (1931).

Clearly, Milky Way's suggestion (Juris. Stmt. pp. 27-30) of proceedings prior to arrest does not afford a preferable alternative to the arrest as a first step. In *Delta Book Distributors* v. *Cronvich supra*, 304 F. Supp. at p. 667, the Court recognized that procedures prior to arrest may themselves constitute a form of prior restraint, citing the expense of legal representation, and apprehension whether the material in question should continue to be sold pending the outcome of the hearing.

In summary, then, it seems clear that if the States have constitutional power to regulate obscenity, use of the arrest as the traditional first step in such regulation does not offend the Constitution.

**III. The presumption of knowledge of the character and contents of publications, contained in Penal Law § 235.10, is not unconstitutional.**

Appellant New York Feed Company (alone) contends that N. Y. Penal Law § 235.10 contains an unconstitutional presumption of knowledge, on the part of the seller, of the character and content of the publications which he sells or offers to sell (*N. Y. Feed Co.* Juris. Stmt. pp. 20-21). The Court below declined to pass upon the question,

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* Bearing in mind that no *Dombrowski*-style bad faith is present in this record, as shown above.

citing the lack of sufficient facts in the record, and the open question of construction by the New York courts (20a-22a).

The only response of appellant in this regard is to "common sense." This is in no way any tenable challenge to the position of the District Court. We submit that the disposition is unassailable.

Apart from that, it is apparent that the challenge is untenable.

*New York Feed* seems to claim that the presumption negatives the element of *scienter* in the crime of obscenity, and that the presumption is irrational.

So far as *scienter* is concerned, New York renders it a necessary element both by statute and by probable (if not certain) State court construction. Penal Law § 235.10, which sets forth the presumption, must be read together with Penal Law § 235.05 (*N. Y. Feed* Juris. Stmt. p. 3), which prescribes knowledge of the content and character of the publication as a necessary element of any conviction for obscenity. *Smith* v. *California, supra,* 361 U. S. 147, decided prior to the enactment of § 235.05, held such an element to be a constitutional necessity. Thereafter, in construing former Penal Law § 1141 (predecessor of Article 235) the New York courts recognized *scienter* as a necessary element, *People* v. *Finkelstein,* 9 N. Y. 2d 342 (1963), and would doubtless so recognize it today, even if it were not enshrined in the statute.

With respect to the rationality of the presumption of knowledge, *New York Feed's* reliance on *Leary* v. *United States,* 395 U. S. 6 (1969) is misplaced. That case reiterated the long-standing rule that a presumption must have a rational relationship to reality. There, the presumption was that the defendant not only knew that he possessed marijuana, but knew that it was *imported.* This presumption was held to fall in face of the well-known

fact that marijuana can be grown in the United States.* This is quite different from a presumption that a seller of pornographic materials knows what he is selling. The presumption in any event has been held rebuttable, for example by a luncheonette owner who works long hours and lacks sufficient time to read his wares. *People* v. *Engel*, 7 N. Y. 2d 1002 (1960).

## CONCLUSION

**For the foregoing reasons, the within motion to dismiss or affirm should be granted.**

Dated: New York, N. Y., February 3, 1970.

Respectfully submitted,

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* On January 20, 1970, this Court held valid a presumption of knowledge that heroin is imported. *Turner* v. *United States*, —— U. S. ——, 38 U.S.L.W. 4103.